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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 432

ROBERT H. KENNEY

Petitioner

versus

WABASH RAILROAD COMPANY

Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I. REASONS WRIT SHOULD NOT BE GRANTED

It is respectfully suggested that the petition for a writ of certiorari filed herein should be denied in this case for the following reasons:

1) No special and important reasons, or issues of general significance, are presented by this application, as required by Rule 38 (5) of the United States Supreme Court.

2) The decisions of the District Court and of the Circuit Court of Appeals for the Fifth Circuit turn entirely on questions of the particular facts in this case, which are highly unusual and individual.

3) The "Specifications of Errors" asserted by petitioner (Petition p. 5-6) patently do not constitute error, while the "Reasons for Granting the Writ" (Petition p. 6-7) bear no relationship to the issues presented by the record of this case.

4) The unanimous opinions of both Courts below are obviously correct.

II. STATEMENT OF THE CASE

The statement of this case as given in the petition for the writ is largely without foundation because it goes outside of the Record to present matter as facts for which there is no support in the Record. All of the facts in this case were stipulated,[1] and the petitioner is not entitled to go outside of the Record and to bring extraneous unsupported matter before this Court. It is therefore necessary to restate the facts.

The facts of the case as stipulated below,[2] and as found both by the Trial Court and by the Court of Appeals for the Fifth Circuit, are as follows:

Mr. Kenney was employed by the Wabash Railroad Company from November 1, 1940, to November 30, 1943,

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[1] Transcript, pp. 14 and following.
[2] Ibid.

when he terminated his employment with the Railroad Company "solely for the purpose of accepting civilan employment in the United States War Department, Army Transportation Corp."[3] He did not become an officer or member of the crew of any vessel until January 1, 1944, when he commenced serving as a steward yoeman on the USA H.S. ALGONQUIN; and he thereafter served as a civilian officer and crew member on various vessels owned by, chartered to, or operated by or for the account or use of the War Department.[4] He was never an enrollee in the United States Maritime Service,[5] nor was he ever employed either by the War Shipping Administration or by the United States Maritime Service.[6]

Mr. Kenney left the Federal Service on or about February 12, 1945, and by letter of March 17, 1945, made application to Wabash Railroad Company for reinstatement to his prior position. The Federal Reemployment Act in effect at that time—the Act of June 23, 1943[7]—unquestionably did not give Mr. Kenney any reemployment rights with Wabash Railroad Company, and the Railroad refused to reinstate or reemploy Mr. Kenney by letter dated March 28, 1945.[8]

The Reemployment Act was amended on August 8,

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[3] Stipulation No. 16, Transcript p. 17.
[4] Stipulation No. 1, Transcript p. 13.
[5] Stipulation No. 10, Transcript p. 16.
[6] Stipulation No. 17, Transcript p. 17.
[7] c. 142, 57 Stat. 162. See discussion *infra* pp. 9, 10, and Opinions below, Transcript pp. 21, 29.
[8] Stipulation No. 4, Transcript p. 14.

1946,[9] under the terms of which, if applicable to the facts of this case, Mr. Kenney may conceivably have been entitled to reemployment. However, even then, he did not again apply for reemployment until March 26, 1948, some nineteen months after he conceivably became eligible for reemployment, and almost three years after his first application was denied.[10] However, on the date of his second application, Mr. Kenney had not received and did not possess a Certificate of Substantially Continuous Service in the United States Merchant Marine,[11] required to be received by an applicant for reemployment under both the 1943 and the 1946 Acts;[12] nor had he received such Certificate on the dates of his subsequent applications of April 13 and April 27 of 1948. All of the applications for reemployment were refused by Wabash Railroad Company.[13]

It was not until June 10, 1948, that Mr. Kenney received and possessed a Certificate of Substantially Continuous Service,[14] and under date of June 17, 1948, he again made application for reemployment for the first time advising Wabash Railroad Company that he possessed a Certificate of Substantially Continuous Service in the United States Merchant Marine. Again his application for reinstatement was refused.

On the basis of the above facts, the District Court

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[9] c. 867, 60 Stat. 905.
[10] Stipulation No. 5, Transcript p. 14.
[11] Stipulation No. 2, Transcript p. 14.
[12] Acts *Supra* Notes 7 and 9, Section 2 (a) (1).
[13] Stipulation Nos. 4, 7, 8, Transcript pp. 14. 15.
[14] *Ibid* Note 11.

held that Mr. Kenney was not entitled to reinstatement at any time prior to the Act of August 8, 1946; that the 1946 Act is not retroactive to the extent of affecting the reemployment rights of Mr. Kenney and the correlative reemployment obligations of the Railroad Company, which became fixed pursuant to the 1943 Act, and further held that Mr. Kenney was not entitled to reemployment even under the 1946 Act because of his neglect and failure to secure a Certificate of Substantially Continuous Service and apply for reinstatement within 90 days after the adoption of that Act on August 8, 1946—his application of June 17, 1948, coming too late.[15] The United States Circuit Court of Appeals for the Fifth Circuit unanimously affirmed the holding of the District Court in an opinion stating:[16]

> "an unexplained delay of over twenty two months in obtaining the Certificate is clearly unreasonable".

III. ARGUMENT

1) No Special and Important Reasons for Granting Certiorari are Presented by this Application

a) The Issues Involved are Factual and Nonrecurring

Rule 39 (5) of this Court makes it clear that certiorari will be granted only where special and important reasons exist, usually involving issues of general significance. It

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[15] Conclusions of Law, Transcript pp. 21, 22.
[16] Transcript, p. 29.

is plain that no such circumstances are presented by this application. The above recitation of the facts in this case, and the decisions of both of the lower Courts, show that this case turned entirely upon a most unusual fact setting not likely to be repeated. In the first place, the statute upon which the petitioner bases his case was amended a year and a half after his first application for reemployment, and his claim is based on the retroactive applicability of that amendment to reemployment rights and obligations which were non-existant under the original statute, at the time of his original application for reemployment. Furthermore, the statute itself requires that an application for reemployment be made within 90 days after the applicant leaves the maritime service. This is a condition impossible of fulfillment by petitioner because the statute was passed a year and a quarter after the 90 day period had expired. Again, the statute makes it a condition of reemployment that the applicant receive a Certificate of Substantially Continuous Service. Mr. Kenney did not receive such a Certificate until June 10, 1948, some three and one half years after he left the maritime service, and twenty two months after the 1946 amendment granting him reemployment rights was enacted. Certainly such an unusual set of circumstances will rarely be repeated and do not constitute the "special and important reasons" for the issuance of a writ of certiorari by this Court.

b) Errors Alleged are Unfounded

In this connection, it must be pointed out that the alleged "Specification of Errors to be Urged" as reproduced

on Pages 5 and 6 of petitioner's brief, are patently not error. In the 1st and 2nd alleged errors, the holding of the lower Court is not in conflict with any law of Congress, but is based upon the facts expressly stipulated in the Record in this case.[17]

As to specification No. 3, the Reemployment Acts themselves require an applicant for reemployment to "receive such certificate" as a condition of his eligibility for reemployment, and any regulation of the United States Maritime Commission to the contrary (and no specific regulation is referred to), would be in violation of the Reemployment Acts of Congress.

As to specification No. 4, both of the Courts below recognized that Mr. Kenney may have been entitled to a Certificate of Substantially Continuous Service under the 1946 Act, but held that his unreasonable delay of over twenty-two months in receiving it defeated his right to reemployment in view of the 90 day provision of the statute.

As to the 5th and 6th specifications of error, in view of the fact that the Acts allow only 90 days within which to apply for reemployment, it would certainly seem that the lower Courts' holding that a delay of almost two years from the date of the amended statute, and almost three years from his eligibility date for reemployment, was un-

[17] As to Specification of Error No. 1, See Fact Stipulations Nos. 16 Transcript pp. 16-17. As to Specification of Error No. 2, see Stipulation of Fact Nos. 10, 15, 16, and 17, Transcript pp. 16-17.

reasonable and barred Mr. Kenney's right to reemployment.

As to the 7th specification of error, again the Maritime Commission regulations cannot repeal the requirement of the reemployment statute that an applicant for reemployment must "receive such certificate" of substantially continuous service as a condition of his eligibility.

c) "Reasons for Granting Writ" are Not Applicable to this Case

Finally, the "Reasons for Granting the Writ" set out on Pages 6 and 7 of petitioner's brief, bear no relation whatsoever to the case at bar, as a mere reading of such alleged "Reasons" will show. The decision of the Court below has nothing to do with the registry or enrollment of vessels as alleged in the first "Reason". Neither does the decision have any bearing on the rights and privileges of "seamen", as alleged in the second "Reason". It involves only reemployment rights of persons who left their civilian employ to serve in the Merchant Marine—a right not accorded to "seamen" as such. The same may be said for the 3rd and 4th alleged "Reasons", with the additional comment that no "rules of common law" whatsoever are applied in this case, Mr. Kenney's rights being entirely statutory, and based on the reemployment acts of Congress.

The 5th alleged "Reason"—that the Circuit Court's decision "would create chaos of such magnitude as to nullify the *Merchant Marine Acts* and supporting statutes"—besides being so vague and indefinite as to be meaningless,

just is not accurate; because as repeatedly pointed out, the only acts involved in this entire controversy are the Reemployment Acts, which are special wartime statutes, having nothing to do with any of the general features of the Merchant Marine Acts or the Maritime law.

2) The Decisions of the Lower Courts are Unquestionably Correct

It is impossible to see how the lower Courts could have arrived at any conclusion other than that at which they did arrive. Petitioner cannot possibly be entitled to reemployment under the terms of either of the Reemployment Statutes for the following reasons:

(a). Applicable Statutes

The only statute in existence affecting this suit during all the time of Mr. Kenney's actual employment by the War Department is the Act of June 23, 1943, c. 142, 57 Stat. 162, reading as follows:

> "Sec. 1. When used in this Act the term "service in the merchant marine" means service as an officer or member of the crew on or in connection with a vessel documented under the laws of the United States or a vessel owned by, chartered to, or operated by or for the account or use of the Administrator, as an enrollee in the United States Maritime Service on active duty, and, to such extent as the administrator shall prescribe, any period awaiting assignment to such service and any period of education or training for such service in any school or institution under the

jurisdiction of the Administrator. Any person entering service in the merchant marine after May 1, 1940 . . . who, in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration, completes a period of substantially continuous service in the merchant marine, shall be entitled to a Certificate to that effect from the Administrator upon completion of such period, which shall include a record of any special proficiency or merit obtained

Sec. 2 (a). In the case of any such person who, in order to perform service in the merchant marine, has left or leaves a position . . . in the employ of any employer and who (1) receives such Certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within 40 days after completion of such service—

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

It will be observed that appellant cannot possibly be entitled to reinstatement under the terms of the above provision for the following reasons:

1. Mr. Kenney did not leave his employment with Wabash "in order to perform service in the merchant marine", as required by the Statute, but simply and "solely for the purpose of accepting civilian employment in the

United States War Department Army Transportation Corps, *and for no other purpose*", as above stipulated and found by the District Judge.

2. He was not an enrollee in the United States Maritime Service as required by the Statute, but a civilian employee of the United States War Department.

3. He could not satisfy the requirements of Section 2 (a), (1) and (3) of the above Statute, because he did not possess, and indeed was not entitled to receive a Certificate of Substantially Continuous Service. Hence he could not make the proper application for re-employment within 40 days after completion of his services.

It seems very plain, then, that as of the date of Mr. Kenney's first application for re-employment—March 17, 1945—he was not entitled to re-employment under the Act then in existence. Indeed, Mr. Kenney does not rely on the above Statute, but rather relies on the amendment thereof which became effective August 8, 1946, for his re-employment rights. At this time it is proper to say that it would certainly appear that the rights both of Mr. Kenney and of the Wabash Railroad Company became vested completely in 1945, and that it was not the intention of Congress by passing the Act of 1946 to make it retroactive to a case such as this.

But even independently of the constiutional objections, Mr. Kenney cannot meet the requirements of the

August 8, 1946, amendment. That amendment reads as follows.[15]

> That effective as of June 23, 1943, the Act entitled "An Act to provide reemployment rights for persons who leave their positions to serve in the merchant marine, and for other purposes", approved June 23, 1943 (57 Stat. 162) is amended to read as follows:
>
> (a) When used in this Act the term "service in the merchant marine" means . . . (2) service as a civilian officer or member of the crew on or in connection with a vessel owned by, chartered to, or operated by or for the account or use of the War Department.
>
> (b) Any person entering service in the merchant marine after May 1, 1940, and before the termination of the unlimited national emergency declared by the President on May 27, 1941, who, in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration, completes a period of substantially continuous service in the merchant marine, shall be entitled to a certificate to that effect from the Administrator upon completion of such period, which shall include a record of any special proficiency or merit obtained."

Section 2 of the amended Act is identical to the quoted portions of the original Act above except that it extends the period for application for re-employment to 90 days after completion of such service instead of the 40 days as provided in the original act.

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[15] Public Law No. 660, 79th Congress (50 U. S. C. Supp. V, app. Secs. 1471-1475).

Mr. Kenney cannot meet the requirements of the 1946 amendment to the Act for at least two reasons:

1. Again, because Mr. Kenney did not leave his employment with Wabash "in order to perform service in the merchant marine", as required by Section 2 of the Statute, but simply and "solely for the purpose of accepting civilian employment in the United States War Department Army Transportation Corps, *and for no other purpose*", as stipulated and found by the District Judge. The 1946 amendment made no change in this requirement. Indeed, Mr. Kenney did not serve as a civilian officer or member of the crew of any vessel until more than a month after he left the employ of the Railroad.

2. It will be observed from the Stipulation and the facts found by the District Judge that Mr. Kenney did not even make an application for re-instatement under the amended Act within 90 days after the passage of such Act —which would have been November 8, 1946. Indeed, he made no effort at re-instatement under the 1946 Act until March 26, 1948. Obviously by that time there is no way to say, by any stretch of the imagination, that he complied with the requirements for making application for re-instatement "within 90 days after completion of such service". And even then, Mr. Kenney did not "receive such Certificate", and indeed did not receive a Certificate until June 10, 1948.

(b). 1946 Act Not Retroactive, and if so, Unconstitutional

It is a well established rule of statutory construction that legislatures are presumed to intend statutes to operate

prospectively only and not retroactively.[19] Sections 1471-1475, enacted August 8, 1946, are presumed, therefore, to operate prospectively only, and not retroactively, with respect to persons not covered by the original act.

Amendment V of the Constitution of the United States provides that "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

To give to Sections 1471-1475, enacted August 8, 1946, retroactive effect so as to clothe petitioner with a reemployment right on March 17, 1945, when no such right existed, and to compel defendant in 1949 to reemploy petitioner on the basis of an application for reemployment in 1945, would deprive the defendant of property without due process of law, in violation of the 5th Amendment.

A statute cannot constitutionally impose an obligation with respect to a transaction that at the time it took place gave rise to no obligation. A statute cannot constitutionally be construed so as to give a petitioner a cause of action that did not exist at the time of the transaction upon which said cause is founded.[20]

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[19] *Hassett v. Welch* (1938) 303 U. S. 303, 82 L. ed. 585, 867, 58 S. Ct. 559; *United States v. Heth* (1806) 3 Cranch 399, 413, 2 L. ed. 479, 483.

[20] 16 C. J. S. 862, Section 417; 11 Am. Jur. 1193, Section 365; 50 Am. Jur. 492, Section 475; *Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Draining District* (1922) 258 U. S. 338, 66 L. ed. 647; *Bernhardt v. Atlantic Finance Corporation* (1942) 40 N. E. 2d 713, 311 Mass. 183; *Mulligan v. Hilton* (1940) 24 N. E. 2d 676, 679, 133 A. L. R. 376; *Duff v. Black Diamond Collieries* (1930) 33 S. W. 2d 63, 161 Tenn. 486; *Carder Realty Corporation v. State*, 23 N. Y. S. 2d 395, 260 App. Div. 459, affd., 38 N. E. 2d 194, 285 N. Y. 803.

"Retrospective legislation is generally not favored by the courts and where there is an open question of construction of a statute with respect to whether it should be applied retrospectively, it will only be so applied where it clearly does not impinge upon constitutional protection."[21] Retroactive legislation generally will not be allowed to impair vested or property rights.[22]

Article 1, Section 9, of the Constitution of the United States provides that "No Bill of Attainder or ex post facto Law shall be passed".

Section 1473, authorizes district courts of the United States "to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action". Hence, Section 1473 provides for penalties which, if here imposed by reason of a retrospective application of the statute, is violative of Article 1, Section 9 of the United States Constitution.

The Constitutional clause applies to cases for recovery of penalties and forfeitures, and not merely to criminal laws and cases.[23]

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[21] *Seese v. Bethlehem Steel Co.* (1947) 74 F. Supp. 412, 417; *Duke Power Co. v. South Carolina Tax Comm.* (1936) 81 F. 2d 513, 516.

[22] *Lynch v. United States* (1934) 292 U. S. 571, 580, 78 L. ed. 1434, 1441; *Ettor v. City of Tacoma* (1913) 228 U. S. 148, 156, 57 L. ed. 773.

[23] *U. S. v. Hughes*, D. C., N. Y. (1875), 8 Ben. 29, 26 Fed. Cas. No. 15,416.

(c). Congressional Intent

The reemployment statute, although entirely proper under its emergency circumstances, is one which places great administrative burdens on employers. Congress certainly recognized that fact as evidenced by the restrictions and limitations that Congress placed in the law. Paramount are the requirements that the employee seeking reinstatement must possess a Certificate of Substantially Continuous Service, and act diligently and promptly in notifying his employer of his desire for reinstatement. Also, obviously, the employer must have some protection and security against unreasonable and unseasonable demands for reemployment else an employer would never know when a demand would be made on him for reemployment, and he would not be able to hold his organization together. Congress has stated that such demand, accompanied by such a certificate, must be made within not more than 90 days "after completion of such service". Here the service was completed February 12, 1945, yet no proper demand in compliance with the procedure set forth in the statute was made on defendant until June 17, 1948—more than three years later; and this even though such a Certificate could have been procured by Mr. Kenney immediately after August 8, 1946.

It is clear that Congress never intended for the statute to be applied retroactively so as to force reemployment of a person not entitled thereto at the time such person left federal employment; and certainly Congress never intended the Act to require reinstatement more than three (3) years

thereafter when the statute specifically requires a proper application therefore to be made "within 40 (90) days after completion of such service". It is apparent that the rights of all of the parties hereto—both Mr. Kenney's right to reemployment, and Wabash's right to refuse reemployment—vested in the parties within 40 days after February 12, 1945 under the express terms of the statute then in force. An interpretation of the subsequent Reemployment Act of August 8, 1946, in such a way as to change a year and a half later the correlative rights vested in the parties 40 days after February 12, 1945, would certainly render such Act unconstitutional in its application to such vested rights under the Fifth Amendment to the United States Constitution.

Even if plaintiff ever had any reemployment rights, he has certainly slept on them, and, according to the very terms of the statute on which he relies, they have lapsed. Indeed, Mr. Kenney is asking this court to re-write the statute to suit his own convenience, and in so doing to run afoul of the guaranties of the United States Constitution.

IV. CONCLUSION

It is respectfully submitted, therefore, that no special or important reasons are presented by the applicant for the granting of a writ of certiorari by this Court, and that indeed, the issues involved in this case are mainly factual and certainly of a non-recurring nature. Moreover, it is apparent on the face of them, both that the errors alleged to have been committed by the lower Court are totally

unfounded, and that the reasons for the granting of this writ are not applicable to this case.

Finally, it is fully apparent that not only is the decision of the lower Court correct, but that no other decision could possibly be arrived at without doing violence to the reemployment statutes in question, and running afoul of constitutional guarantees. The petition for a writ of certiorari in this case should therefore be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of this memorandum was mailed to Robert Ash, counsel for petitioner, 550 Munsey Building, Washington 4, D. C., on this the 19th day of December, 1952.

James J. Morrison

James J. Morrison
Counsel for Respondent